(c) Unauthorized entry is prohibited.

(d) The term "protectee" as used in this rule includes the President and any other person receiving protection from the United States Secret Service as provided by law.

STATEMENT OF THE CASE

A. Statement of Facts

On October 24, 2002, the President of the United States visited Columbia, South Carolina, for a rally being held in a hanger located at the airport. In advance of the President's trip, the Secret Service had defined what it called a "restricted area" around the site of the visit. That area extended approximately 100 yards on either side of the hanger and approximately ½ mile away from the hanger. (Appendix 82-83). There were, however, no cordons, barriers or other indicia of a boundary surrounding this area. (Judge Magistrate Order and Verdict Appendix 47-63). According to the site agent for the Secret Service, this area was "restricted" from 7:30 in the morning until the President left the rally. (Appendix 73-74). Nonetheless, from 7:30 until shortly before the President's arrival at approximately noon, vehicles were permitted to traverse the roads and pedestrians were allowed to walk freely through the area. The Secret Service's policy was, according to their testimony at trial, that while people could pass through the "restricted" area (Appendix 73-74), no one other than ticket holders was supposed to come into this area and "remain in or, in

effect, 'hang out' in the area." (Cohen Appendix 77-78). *It was stipulated at trial that tickets for the event were* taken at the door of the venue (Cohen Appendix 71-72) and that numerous unscreened citizens were in the immediate area at the time and place the petitioner was arrested (Abel Appendix 91).

Petitioner, Mr. Brett Bursey, arrived at the airport for the purpose of protesting the President's policies. Mr. Bursey, carryir ; a sign and a megaphone, walked to a grassy area on the side of Airport Boulevard approximately 500 feet from the entrance to the hanger (Gov. Exhibit 1: aerial photograph not included, Fourth Circuit Joint Appendix 681). When he was advised that he could not remain in that location, Mr. Bursey crossed the street diagonally to the far corner of the intersection across from the hanger. He was advised that he could not remain in that location either and that he would have to leave the area. Special Agent Abel told Mr. Bursey that if he wanted to demonstrate, the only place he could do so was the designated demonstration area (Abel Appendix 88-89) approximately one-half-mile away. (Cohen Appendix 72-73). When Mr. Bursey did not leave, Agent Abel contacted the airport police and asked them to arrest Mr. Bursey (Abel Appendix 93-94).

Several people joined Mr. Bursey and were also told they had to go to the demonstration area or be arrested. At this point, Mr. Bursey was holding a poster board sign that said: "No more war for oil, don't invade Iraq." Mr. Bursey was approached by Metropolitan Airport Sergeant Campbell and told to go to the demonstration area or be arrested (Campbell

Appendix 99). Mr. Bursey then asked what he would be arrested for and he was told "for trespassing." (Campbell Appendix 99). Mr. Bursey was unaware of any law making him liable for entering or remaining in a restricted area, and unaware that the area in question was federally restricted. (Bursey Appendix 114-115). Mr. Bursey refused to leave and was arrested on state charges of trespass after notice.

The trespass charges were dismissed when the airport police realized that a trespass charge could not be prosecuted given that Mr. Bursey was arrested on public property. (Campbell Appendix 100-103). Four and a half months later, and concurrent with the dismissal of state charges, Mr. Bursey was charged in a one-count information that he "knowingly and willfully did enter and remain in and on grounds...which was then a posted, cordoned off and restricted area where the President of the United States was temporarily visiting, in violation of the regulations governing ingress and egress thereto" in violation of Title 18 United States Code, Section 1752(a)(1)(ii).

B. Conflicting Evidence and Findings of Fact

Mr. Bursey was tried before United States Magistrate Judge Bristow on November 12 and 13, 2003. A judgment of conviction was entered on January 6, 2004 and Mr. Bursey was sentenced to pay a $500.00 fine and Special Assessment of $10.00. In part, the Magistrate found that law enforcement officers were stationed at the perimeters of the alleged "restricted area" and were patrolling the area inside. Moreover, the Magistrate found that there were no

barriers or other indicia of a boundary surrounding the area. The court also determined that Mr. Bursey was in a restricted area as defined by the statute at the time of his arrest. Finally, the Magistrate found that no evidence showed that any other persons, either supporting the President or opposing him, were allowed to remain in the area around the hanger for the purpose of demonstrating *upon the President's arrival.* (Magistrate Order and Verdict) The court, however, *did not* make a finding "as to the precise time of Mr. Bursey's arrest in relation to the time of the shut down," as conflicting testimony was present in the record. (4CCA Judgment).

On January 13, 2004, a Notice of Appeal was filed with the District Court which rendered its Judgment Affirming Conviction on September 14, 2004. Although the District Court determined that no specific finding was made by the Magistrate on the precise time of Mr. Bursey's arrest, the District Court nevertheless determined that at the time of Mr. Bursey's arrest the restricted area had been "shut down." (Order on Appeal). This terminology, which constituted a new factual determination, was not used by the Magistrate, nor found in the language of the statute or regulations. A Notice of Appeal was filed with the Fourth Circuit Court of Appeals on September 14, 2004. On July 25, 2005, the Fourth Circuit Panel affirmed the District Court's judgment, finding that the boundaries of the restricted area were visibly marked in light of the fact that officers were stationed along the perimeters of the area. The Fourth Circuit also determined that "the area was restricted to all but authorized persons, as provided for in the Regulations, at the time of his

arrest," and affirmed the District Court's determination that the restricted area had been "shut down." (4CCA Judgment). No such finding was made by the Magistrate Judge. Nor could such a finding be made consistent with any fair reading of the record.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE ALLOWS THE COURT TO ESTABLISH THAT PUBLIC AREAS WHERE FIRST AMENDMENT RIGHTS ARE RESTRICTED FOR THE SECURITY OF THE PRESIDENT, MUST BE CLEARLY MARKED AND ENTRANCE RESTRICTED, SO AS TO AVOID VIOLATING FIRST AND FOURTEENTH AMENDMENT RIGHTS TO FREE SPEECH AND DUE PROCESS

Carefully balancing presidential security with the right to engage in political dissent is truly a task of exceptional importance. Concerns that government officials may selectively and discriminatorily enforce "restricted areas" at the request of the Secret Service are not hypothetical or limited to this case. (*See, e.g.*, Michigan case: Appendix 135; Philadelphia case: Appendix 120-126; Pittsburgh case Appendix 127-131; St. Petersburg case: Appendix 132-134). In virtually all of several recent cases, protesters who refused to go to a designated free speech zone were charged with trespass, disorderly conduct, and the like, however, most charges were later dismissed. Thus, while the

Court must necessarily rule on the facts of this case and the statute at issue here, these other incidents demonstrate the importance of determining the limits on the government's power to restrict the exercise of free speech in the name of security.

A. The restriction imposed upon Petitioner's First Amendment right to free speech and lawful assembly was not narrowly tailored to achieve the government's interest in protecting the President's safety.

The government has the power to regulate conduct associated with First Amendment rights to speech and assembly, although the breadth of this power depends upon the designation of the forum. In balancing the government's interest in limiting the use of its property against the interests of those who wish to use the property for expressive activity, this Court has identified three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum. *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 572-73 (1987). Publicly owned spaces have a 'public forum' nature that imbues speech in such spaces with greater First Amendment protection, and consequently subjects any restriction to heightened scrutiny. *Id.* at 573.

In a traditional public forum, the state may enforce regulations of time, place, and manner of expression which are content-neutral, but they must be narrowly tailored to serve a significant government interest. *Jews for Jesus*, 482 U.S. at 573, citing *Perry Ed.*

Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 45 (1983). The State must also leave open ample alternative channels of communication for free speech. *Id.* A state entity cannot exclude a speaker from a traditional public forum altogether unless "the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Arkansas Educational Television Commission v. Forbes*, 523 U.S. at 677, 1641.

It is undisputed that the airport premises upon which Petitioner attempted to exercise his First Amendment rights were public property, as evidenced by prior court ruling. *State v. Hanapole*, 255 S.C. 258, 267 (S.C. 1970). As a public space in which citizens have previously engaged in political protest, the airport grounds represent a traditional public forum which provided Petitioner with heightened protection of his First Amendment rights. Although Petitioner does not dispute that the security of the President constitutes a legitimate government interest, the State failed to narrowly tailor its restriction of Petitioner's right to free speech to serve this interest. The imposed restriction (i.e. the statute and regulation) was unreasonable as applied to Petitioner given the Government's failure to clearly and visibly demarcate the boundary creating the "restricted area." The District Court and Fourth Circuit ignored the Magistrate's finding *"that there were no barriers or other indicia of a boundary surrounding the area"* (emphasis added) (Magistrate Judge's Verdict), and made a factual determination that positioning of an unspecified number of officers around the perimeter who did not prohibit entry, or advise citizens they

were entering a restricted area (Agent Cohen Appendix 83-85; Rogers Appendix 104-105; Sanders Appendix 106-107; Rudolph Appendix 110-112), met the statutory requirement for public notice of a restricted area. Improperly relying on another statement from the Magistrate verdict, which was taken out of context, the Fourth Circuit concluded:

> "We need not determine whether, as Bursey contends, the Statute requires a physical demarcation of a restricted area. This is because, contrary to Bursey's assertions of fact, the boundaries of this restricted area were visibly marked. Indeed, the Magistrate Judge specifically found that the law enforcement agents were stationed at the perimeters of the area." (4CCA Opinion).

Furthermore, it was clear error and distortion of the congressional intent and the plain meaning of the express language of the statute to equate "stationed" with "cordoned off." As the panel noted, "cordoned off" includes "to prevent passage". (4CCA Opinion). The same dictionary used by the panel reveals that among the many meanings of "station," none of them include preventing passage or closing off or restricting passage. Thus, the Magistrate was accurate to say officers were "stationed" at the perimeters of the so-called restricted area. It is a totally different issue as to whether ingress and egress was restricted as required by the statute and the regulation. Mr. Bursey does not challenge the finding that officers were located at intersections leading to the airport. Traffic was heavy

and officers were directing traffic and assisting with parking for the event. However, there was absolutely no testimony that officers lined the entire 100- square acres serving notice and prohibiting entry. Moreover, those officers at the intersections leading to the airport did not prevent passage and were not operating to close off, restrict, or control access as required to serve any notice that the area was restricted. Quite to the contrary, thousands of individuals in vehicles were allowed by these "stationed" officers to pass into the so-called "restricted area." After acknowledging several times that these "stationed" officers allowed access into the so-called restricted area (Appendix 73-76; 76-78), Secret Service Agent in Charge Douglas Cohen was further questioned by the Judge Magistrate on this point: Q. "And you had police officers, not necessarily Secret Service Agents, but police officers posted at what you considered to be the perimeter of what you wanted to be your restricted area?" A. "Yes" (Appendix 84) Q. "Now, but prior to the president's arrival, they weren't stopping people coming in and out, were they? Like, if a car pulls off [Highway] 302 onto Airport Boulevard, the officer down there is not stopping them?" A. "That's correct." (Appendix 84)

Mr. Bursey testified that he was standing at the main area of egress where the Fourth Circuit assumed that police were posted to insure compliance with the statute. "They (police) weren't saying "are you ticketed, let me see your ticket. They were stopping traffic and telling pedestrians to cross, much as if you were going to a sporting event." (Bursey Appendix 80-81) Those officers were the ones the Magistrate was referring to when he wrote "law enforcement agents

were stationed at the perimeters of the area" and clearly those officers had not "posted, cordoned off or otherwise restricted" ingress and egress to the area as specifically required by both the statute and regulation. Therefore, it is not inconsistent to say, as the Magistrate did, that there were officers stationed at the perimeter of the area and also find "there were no boundaries or other indicia of a boundary." (Magistrate Order and Verdict).

Moreover, evidence in the record clearly indicated that officers refused to tell Mr. Bursey where the alleged restricted zone ended. During trial, when asked whether Mr. Bursey was told where the secure area ended, the agent at the site stated: "No sir. But there was no reason for us to tell him that because of the security of the president." (Baker Appendix 96-97). This testimony speaks volumes: not only was there no notice, law enforcement clearly believed concealing the boundaries was essential to security. Such lack of definition is not consistent with reasonable time, place, and manner restrictions because it fails to provide reasonable notice of the area in which First Amendment privilege is restricted.

B. The regulation, as applied by law enforcement officials and interpreted by the lower courts, was overbroad, vague and provided unfettered discretion to law enforcement officials.

This Court must provide guidance in interpreting what level of notice is required under 18 U.S.C. § 1752(a)(1) to create a "restricted area." If the lower courts' determinations are allowed to stand, this

statute will provide government officials with unfettered discretion to remove protesters from the sight and sound of their intended audiences. Although the government may regulate a citizen's First Amendment right to use public spaces to communicate views on national questions, this right "must not, in the guise of regulation, be abridged or denied." *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515-16 (1939). As this court cautioned in *Hague*, a law or regulation must avoid enabling a government official to refuse the free expression of speech according to her "mere opinion that such refusal will prevent" disorderly behavior or, in this case, a lack of security for the President. (307 U.S. at 516). Such unbridled discretion could allow the law and regulation to "be made the instrument of arbitrary suppression of free expression of views on national affairs." (internal citations omitted) *Id.*

A criminal law must give persons reasonable notice of what is prohibited, and must not authorize or encourage arbitrary or discriminatory enforcement, or it violates the due process clause. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). The Supreme Court has repeatedly condemned laws which are so vague as to allow for the unfettered discretion in the hands of law enforcement. *See, e.g., Morales*, 527 U.S. at 60; *Kolender v. Lawson*, 461 U.S. 352, 358-60 (1983); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90 (1965); *Cox v. Louisiana*, 379 U.S. 536, 556-57 (1965). This court must correct the lower courts' interpretation and enforcement of 18 U.S.C. § 1752(a)(1)(ii), as to do otherwise would allow the government to make ad hoc rules and "entrust lawmaking to the moment-to-moment judgment of the

policeman on his beat" that results in the suppression of free speech. *Kolender*, 461 U.S. at 360. (citations and internal quote omitted).

Understandably, among the main concerns of Congress in passing Title 18 U.S.C. § 1752(a)(1)(ii) was that the public be given adequate notice of the actual area designated by the Secret Service to be restricted. ("It is anticipated that the Secret Service will make every effort, consistent with Presidential security, to make such restricted areas known to the public." [S. Rep. No. 91-1252. 91st Cong. 2d Sess., 9 (1970): District Court Order). In fact, strict construction of this criminal statute and due regard for constitutionality prompted even the District Court below to state: "[t]he purpose of the requirements for cordoning or posting in the statute now at issue is clearly to give notice that one is entering or within a restricted area." (District Court Order).

The Fourth Circuit's determination that stationing officers at the perimeter sufficiently notified Petitioner of a "restricted area" according to 18 U.S.C. § 1752(a)(1)(ii) and its implementing regulations, ignored material facts and a fair reading of the statute. Petitioner's right to engage in political protest, as protected by the First Amendment, can only be protected by requiring that any area deemed by the Secret Service to be restricted from public access according to the statute be narrowly drawn, clearly and visibly marked. This ensures proper notice that entry is a criminal violation. The First Amendment does not permit the federal government to leave decisions as to the size, contours, and rules for access to secure areas

to the standardless and unfettered discretion of individual Secret Service officers, as demonstrated by the factual record. *See, e.g. Kolender*, 461 U.S. at 358 (of concern is the "potential for arbitrarily suppressing First Amendment activities...[as well as] the constitutional right to freedom of movement") (citations and internal quotes omitted). The District Court and Fourth Circuit's strained and erroneous interpretation of this statute gives unbridled discretion to law enforcement contrary to well established constitutional principles.

The dangerously ambiguous nature of the government's power to regulate protected speech, in contrast to the statute's requirement that any restricted area be "posted, cordoned off, or otherwise restricted," is illustrated by the Judge Magistrate's attempt to determine what would have been an unconstitutional restriction on speech at the area in question. The Judge Magistrate found that had Defendant only "chosen to keep moving *further and further away* from the hanger, and if he had still been arrested, not at the location where he was, but at a *much further* distance from the hanger, he would have had a stronger case that the Government's actions were unreasonable and therefore unconstitutional." (Judge Magistrate's Verdict). Note that the Judge Magistrate made no reference to the Defendant being inside, or outside, of the alleged restricted zone, only "further away." Petitioner testified at trial that when speaking with a Secret Service Agent, he offered to move to an area away from where he was standing, but was told he couldn't be anywhere but the free speech zone. (Abel Appendix 112-113). It was later revealed at trial that the area Mr.

Bursey had proposed to move to (Bursey Appendix 112-113) was in fact outside the alleged "restricted area," illustrating the very danger of allowing individual officers to determine the limits of free speech with little or no guidance from physical boundaries or markers. (Cohen 72-73).

The factual record also contained statements by both of the key Secret Service Agents in this case admitting that balancing security with free speech and first amendment rights was never considered as they planned and executed the events on October 24, 2002. Agent Cohen had never heard of any Secret Service policy that addressed that balance and did not know if one even existed (Cohen Appendix 78-79, 80-82). Agent Abel testified that no such discussion occurred regarding the President's visit that day or for any other presidential visit she had been a part of as an agent (Abel Appendix 87-88). Citing *Zwicker v. Koota*, 389 U.S. 241, 250 (1967), the Magistrate Judge acknowledged that "the Government may not, under the guise of performing a security function, seal off government officials from criticism or unduly restrict the First Amendment rights of citizens to engage in peaceful protest." (Judge Magistrate's Verdict). As clearly illustrated by the record, individual officers were allowed significant discretion to determine who entered and remained in the undefined restricted area, in contravention of explicit language present in the statute. This lack of clarity surely does not provide reasonable time, manner and place restrictions necessary to give notice to sufficiently avoid violating Petitioner's rights to free speech and due process.

II.

THIS CASE ALLOWS THE COURT TO ESTABLISH THAT FEDERAL AGENTS DO NOT HAVE THE "FLEXIBILITY" OF UNFETTERED DISCRETION WHEN ENFORCING CRIMINAL STATUTES.

The District Court found, "There is nothing in the statute to suggest that the Secret Service can only control an area through an absolute prohibition on entry. Such an argument equates 'restricted' with 'shut down,' which is not only contrary to the **flexibility suggested by the statute** but defies common sense..." (District Court Order, emphasis added).

The cannon of strict construction of criminal statutes precludes the flexibility the District Court offers the government agents in enforcing the rule of law. The District Court disregards the statute's clear regulations that do indeed require an absolute prohibition on entry to the referenced restricted areas to all but invitees, authorized persons displaying Secret Service identification documents, and protectees (31 CFR § 408.3).

The Magistrate Judge, in deferring to the discretion of the agents on the ground, found that "**In this age of suicide bombers**...the Secret Service's concern...is not only understandable, but manifestly reasonable." (Magistrate Judge Order, emphasis added). Justice Thurgood Marshall warned in 1985 that "History teaches us that grave threats to liberty

often come in times of urgency, when constitutional rights seem too extravagant to endure."

While the Petitioner believes that strict interpretation of the statute, and its regulations, provides for both the President's security and the citizens' First and Fourteenth Amendment Rights, the Lower Courts cite perilous times, statutory flexibility and common sense as compelling reasons to yield discretion to individual federal agents. Should the statutes and regulations not afford the agents the necessary authority to protect the President, the remedy lies with Congress, not with the Courts.

The District Court's result-driven review of the evidence, which culminated in a dispositive finding that the "restricted area" had been "shut down," exceeded the courts' scope of review and violated Petitioner's rights to due process and reasonable dissent. A district court may review *de novo* only the magistrate's findings of law, and is limited to determining whether there was a sufficiency of evidence to support a conviction when reviewing a magistrate's factual determinations. *United States v. Pasquantino*, 336 F.3d 321, 332 (4th Cir. 2003). Although the district court views the evidence "in the light most favorable to the government," the district court's power of review is limited to vacating factual findings that are clearly erroneous or remanding the case for further factual determinations. *Pasquantino*, 336 F.3d at 332. A district court may not create its own findings of fact upon review of a magistrate's decision.

Since the trial court did not find as a matter of fact that the area in question was "shut down" at the time of defendant's arrest, the panel erred in upholding the conviction based on this essential fact. Mr. Bursey could not have been convicted if the area in which he chose to remain was not restricted within the statute and regulations of 18 U.S.C. § 1752(a)(1)(ii) which makes it an offense to "remain in...a restricted area...in violation of the regulations governing ingress or egress...". The area in question was not restricted within the meaning of the regulations because it was not marked so as to give notice and other people were present in the allegedly "shut down" area. Neither the court nor the Secret Service can deviate from the statute and create a restricted zone called "shut down" that fails to meet the constitutional requirements imposed by Congress, i.e., marked boundaries to give notice and exclusion to all except those authorized by the written regulation. Secret Service agents cannot, consistent with the statute and the constitution, simply select persons to allow in the so-called restricted area and eject those it wants excluded. Such selectivity invites content-based or other non-security based discrimination.

The Fourth Circuit determined that Mr. Bursey's contention on this point was without merit "because the area was restricted to all but authorized persons, as provided for in the Regulations, at the time of his arrest." (4CCA Judgment). No such finding was made by the Magistrate Judge. Nor could such a finding be made consistent with any fair reading of the record. As the panel even acknowledged, "no specific finding was

made on the precise time of Bursey's arrest in relation to the time of the shut down." (4CCA Judgment).

One of the statutory criteria for establishing restricted areas is a provision for the allowance of "invitees" to enter the restricted area. It is common practice for tickets to be issued to determine who is an "invitee" and who may enter the restricted area. The record is clear on the point that where Mr. Bursey was arrested, citizens had not been screened for tickets, and accordingly, the area was not restricted according to statute.[1] Secret Service Agent Cohen testified that people standing in line were "not screened (for tickets) until they come to the building." (Cohen Appendix 71-72). The District Court acknowledged this speculative exercise when it found that "pedestrians were allowed to remain in the area only if they were or **appeared to be** ticket holders." (emphasis added) (District Court Opinion).

Though the panel noted that "there was conflicting testimony on this point," it failed to acknowledge the extent of that conflict, that the overwhelming weight of the evidence demonstrated that the area was not shut down at the time of his arrest and that the only objective evidence (including a signed written memo by Lt. Baker Appendix 116) demonstrated that Mr. Bursey was arrested before the

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[1] In fact, Mr. Bursey's witnesses, who were present at the time and place of his arrest, all testified that no one ever asked them for a ticket. (Rogers Appendix 105: "They did not."); (Sanders Appendix 106 "No"); "No one asked me for anything." (Rudolph Appendix 112). One witness even testified that the police officer "actually didn't tell me to leave, he told me I couldn't be there with a sign." (Rudolph Appendix 108).

area was shut down. The Judge Magistrate's order was clearly erroneous when it stated: "Defendant has presented no evidence to show that any other person...entered or remained in the restricted area with no ticket and no intention of attending the rally, and then refused to leave the restricted area when so instructed." (Judge Magistrate Order).

A number of witnesses testified that they were present in the area and observed Mr. Bursey being arrested and placed in the waiting paddy wagon. Harry Rogers testified that he saw Mr. Bursey arrested and placed in a van from across the street. (Appendix 103) Gerald Rudolph testified that he saw Mr. Bursey being arrested and placed in a paddy wagon and that "[w]hen they started arresting him, he gave me his car keys." (Appendix 109-110). Mr. Bursey testified that when he was brought to the paddy wagon there were still people present and he spoke to them. (Appendix 113-115). Indeed, Secret Service Agent Abel contradicted herself on this very question. (Compare Appendix 85-87, "when I gave him these choices, [to go home, to get in line if he had a ticket, to got to the designated demonstration area, or to be arrested]...at that point it had become restricted to everybody except law enforcement," with Appendix 89-93 acknowledging on cross-examination that when she gave him these options, at that point in time there were other people standing on the south side of Airport Boulevard, waiting in line; Agent Abel acknowledged there were "50 or less, yeah" people waiting in line at Doolittle Hanger when Mr. Bursey was arrested. (Abel Appendix 92). There is no dispute that Bursey asked why he was being arrested when there were other

people standing even closer to the hanger than he was who were not being arrested. (See Appendix 90-93, testimony of Agent Abel; Appendix 94-95, testimony of Lt. Baker). Consistent with that, Lt. Baker's signed memorandum to State Law Enforcement Division Chief Robert Stewart dated February 19, 2003 states: "Mr. Bursey asked why we weren't arresting everyone in the line waiting to go inside the event." (Appendix 116). These are the same people, previously cited as "unscreened" and who "appeared to be ticket holders," who were in the same "restricted area" as Mr. Bursey when he was arrested.

It is entirely understandable that the Secret Service would seek to be flexible in how its operations affect local events, but this flexibility must still provide sufficient notice and remain narrowly tailored so as to avoid unconstitutional levels of discretion in inhibiting free speech. Moreover, if the Secret Service wishes to be more flexible than its regulations require, for example by allowing traffic and pedestrians to travel in an area it is monitoring, it must do so consistently, and not selectively use the regulation to justify criminal prosecution. To hold otherwise would be to allow the Secret Service to restrict the area person-by-person, solely at its discretion, in contravention of the requirement that a restriction on First Amendment speech be narrowly tailored to achieve its purpose.

The lower courts erred in granting unfettered discretion to individual agents and the District Court and the Fourth Circuit engaged in result-driven fact finding in order to justify the criminal conviction, and acted outside the scope of their review in order to

affirm a conviction which violated Petitioner's First and Fourteenth Amendment rights. This Court must not allow 18 U.S.C. § 1752(a)(1) to be used by the government as a tool to violate the right to voice political dissent.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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